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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE GORDON THOMPSON, JR.)

UNITED STATES OF AMERICA, Plaintiff, v. ENRIQUE GARZA-VENCES, Defendant.	Case No.: 08CR1414-GT Date: August 25, 2008 Time: 2:00 p.m. **STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION**

I.

STATEMENT OF FACTS

On March 30, 2008, Mr. Garza-Vences was arrested and charged with attempted illegal entry of a deported alien under 8 U.S.C. § 1326. On May 6, 2008, Mr. Garza-Vences waived indictment on a three-count information charging him with illegal entry under § 1325. On June 11, 2008, Mr. Garza-Vences appeared before this court and pled guilty to the three-count information. His plea agreement stated that he "admits and further agrees that he was lawfully deported and removed on November 15, 2006 after suffering a prior aggravated felony conviction on November 23, 2004, for First Degree Burglary, in violation of California Penal Code § 459/460 . . . *which results in the 16-level increase in the offense level set forth in paragraph 5 below*." See Docket No. __, filed June 11, 2008 (emphasis added). Paragraph 5 in turn states that the parties agree that a 16-level increase under

2L1.2(b)(1)(A) applies, resulting in a guideline range of 57-71 months following a three-level reduction for acceptance of responsibility in a criminal history category of IV. Id.

Following entry of and acceptance of the guilty plea, the parties engaged in further discussions, reviewed extant and pending case law, and ultimately agreed that the increase merited under the guidelines was only eight levels under 2L1.2(b)(1)(C), altering the guideline range significantly. The new guideline range following acceptance in the same criminal history category is 24-30 months, between 23 and 41 months less than what the parties agreed to in the plea agreement. The parties have agreed to a new plea agreement which they will be prepared to enter on the day of this motion hearing. This motion to withdraw follows.

II.

MOTION TO WITHDRAW PLEA OF GUILTY

Mr. Garza-Vences requests that the Court allow him to withdraw his plea of guilty and to plead guilty under a new agreement with the government, to be entered the same day as this motion. Rule 11 of the Federal Rules of Criminal Procedure allows for the withdrawal of a guilty plea after the court's acceptance of the plea, but before it imposes sentence, if the defendant can show a "fair and just reason" for requesting the withdrawal. FED. R. CRIM. P. 11(d)(2)(B). The fair and just reason standard "is applied liberally" and does not require a defendant to demonstrate "that his plea is invalid in order to meet his burden of establishing a fair and just reason for withdrawal." United States v. Davis, 428 F.3d 802, 805, 807 (9th Cir. 2005) (quoting United States v. Ortega-Ascanio, 376 F.3d 879, 884 (9th Cir. 2004)). Rather, a defendant may demonstrate a fair and just reason for plea withdrawal by showing that the unforeseen reason "plausibly *could* have motivated his decision to plead guilty. Nothing in Rule 11(d)(2)(B) requires a defendant to show more in order to satisfy the 'fair and just reason' standard." Davis, 428 F.3d at 808 (emphasis in original).

Here, at the time of the plea both counsel for Mr. Garza-Vences and counsel for the government were under the belief that the sentencing guidelines required a sixteen-level increase under USSG § 2L1.2(b)(1)(A). Mr. Garza-Vences was so informed. This in large part motivated him to plead guilty to the initial offer extended by the government. However, further review of the documents and developments in case law regarding California burglary that occurred soon after his plea of guilty have led both counsel for defendant and counsel for the government to agree that Mr. Garza-Vences is not a "+16." See United States v. Aguila-MontesDeOca, 523 F.3d 1071 (9th Cir. 2008); United States v. Snellenberger, 493 F.3d 1015 (9th Cir.2007) (scheduled for rehearing en banc). Instead, he is only a "+8," under § 2L1.2(b)(1)(C) of the Guidelines. This significantly alters the guideline range for Mr. Garza-Vences, decreasing the sentencing range by half. In addition, the section of the plea agreement in which Mr. Garza-Vences specifically admits that the burglary is a +16 under the guidelines is not correct, in the eyes of both defense counsel and the government. Thus, he cannot in good faith make such an admission.

Counsel, that the guidelines are between 33 and 40 months higher than the law actually calls for is a fair and just reason for withdrawal of a guilty plea. Mr. Garza-Vences respectfully requests that this court allow him to do so.

III.

CONCLUSION

For the foregoing reasons, Mr. Garza-Vences respectfully requests that this Court allow him to withdraw his plea of guilty and enter a plea to a new agreement with the government that correctly reflects the applicable enhancements and the resulting guideline range.

Respectfully submitted,

/s/ David M.C. Peterson

Dated: August 11, 2008

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Attorneys for Mr. Garza-Vences

CERTIFICATE OF SERVICE

Counsel for Defendant certifies that the foregoing pleading is true and accurate to the best of his information and belief, and that a copy of the foregoing document has been served this day upon:

Carla J. Bressler
Carla.J.Bressler@usdoj.gov; efile.dkt.gc1@usdoj.gov

Dated: August 11, 2008

/s/ David M.C. Peterson

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